

1 KAREN A. OVERSTREET  
Chief Bankruptcy Judge  
2 United States Courthouse  
700 Stewart St., Suite 6310  
3 Seattle, WA 98101  
206-370-5330  
4

5 UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 In re )  
 ) Chapter 7  
8 ROBERT JACOB SCOTT and )  
SARAH JANE SCOTT, )  
9 )  
Debtors. )  
10 ) Bankruptcy No. 07-14317  
 )  
11 \_\_\_\_\_ )  
 )  
12 ROBERT JACOB SCOTT and )  
SARAH JANE SCOTT, ) Adversary No. 07-01367  
13 )  
 )  
14 Plaintiffs. )  
 )  
15 V. )  
 )  
16 U.S. DEPARTMENT OF EDUCATION; )  
EDUCAP, INC., THE EDUCATION )  
17 RESOURCES INSTITUTE (TERI), ) **MEMORANDUM DECISION**  
et. al, )  
18 )  
Defendants. )  
19 \_\_\_\_\_ )

20 This matter came before the Court for trial on August 25,  
21 2009. Plaintiffs, Robert and Sarah Scott, seek to discharge their  
22 student loans owed to defendants the U.S. Department of Education  
23 ("USDOE"), EDUCAP, Inc. ("Educap"), and The Education Resources  
24 Institute ("TERI"). For the following reasons, the Court finds  
25 that Plaintiffs have met their burden of proving that they are  
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MEMORANDUM DECISION - 1

1 entitled to discharge of the loans pursuant to Bankruptcy Code §  
2 523(a)(8).<sup>1</sup>

3 **I. FACTS**

4 Robert and Sarah Scott are 33 and 30 years old, respectively.  
5 They are a married couple with two sons, ages five and two.  
6 Plaintiffs filed a petition for relief under Chapter 7 on  
7 September 13, 2007.

8 A. The Student Loans. Plaintiffs took out various student  
9 loans from 1998 to 2005 to pursue study at Bellevue Community  
10 College, Central Washington University, and the University of  
11 Idaho. [Ex. P-1 through P-25]. Sarah Scott received an Associates  
12 of Arts degree from Bellevue Community College in 2002 and a  
13 Bachelor of Arts in Elementary Education, with a minor in Spanish  
14 Education, and a teaching certificate from Central Washington  
15 University in the Spring of 2003. Robert Scott received a Bachelor  
16 of Science degree, specializing in Microbiology, from Central  
17 Washington University in June 2000. Robert Scott pursued a PhD at  
18 the University of Idaho in 2001, but did not graduate because of  
19 health problems that affected his concentration and learning  
20 ability. Subsequently, Robert began a masters program at Central  
21 Washington University from September 2002 to June 2005, but  
22 likewise did not graduate.

23 The loans at issue in this case were issued by USDOE, Educap,  
24 and TERI. Specifically, Sarah and Robert Scott are obligated to  
25 USDOE on six Federal Direct Consolidation Loans disbursed

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26  
27 <sup>1</sup> Unless otherwise indicated, all Code, Chapter, Section and  
28 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*  
and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et seq.*

1 September 29, 1998 through April 5, 2005. [Ex. A-8 through A-13].  
2 The original amount disbursed was \$84,755. [Ex. P-24 and P-26].  
3 Plaintiffs owe \$109,330.19 as of August 25, 2009. Plaintiffs are  
4 obligated to Educap on two loans disbursed July 2, 2004 and  
5 September 21, 2004. The original amount disbursed was \$23,140.72.  
6 [Ex. P-20]. Plaintiffs owe \$34,028.94 as of August 18, 2009.  
7 Finally, Plaintiffs are obligated to TERI on six loans disbursed  
8 January 23, 2002 through January 25, 2005. The original loan  
9 amount disbursed was \$111,433.06. [Ex. P-21]. Plaintiffs owe  
10 \$179,084.68 as of August 5, 2009 on the loans held by TERI.  
11 Collectively, the loans total \$322,443.51, with monthly payments of  
12 \$1,846.28.<sup>2</sup> All of the foregoing educational loans are hereinafter  
13 referred to collectively as the "Loans."

14 B. Income. In 2008, Plaintiffs' joint adjusted gross income  
15 was \$90,116.24. Presently, Sarah Scott is an operations manager at  
16 the Seattle Police Officers Guild and Robert Scott works at the  
17 University of Washington as a molecular biologist conducting  
18 research on fish viruses. Both Robert and Sarah have a consistent  
19 work history since 1999, with only a few instances of unemployment,  
20 which were beyond their control. The Court finds that Plaintiffs'  
21 current monthly net income is \$5,826.72. This amount is calculated  
22 by taking their net income for the last two week pay period,  
23 including deductions for medical and dental, multiplying the amount  
24 by 26 (for the number of pay periods in a year), and dividing the  
25 total by 12. [Ex. P-24].

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26  
27 <sup>2</sup> The foregoing information concerning the current loan  
28 payment and amounts due are taken from the Admitted Facts section  
of the Pre-Trial Order, pages 2 through 5.

1 After graduating with a teaching degree from Central  
2 Washington University in the Spring of 2003, Sarah Scott worked as  
3 a substitute teacher during the 2003-2004 school year in the  
4 Ellensburg School District. She continued to substitute teach in  
5 the Cle Elum-Roslyn School District during the second half of the  
6 2005 school year. After failing to obtain a permanent position in  
7 education, Sarah began work in the front office at Dermatology  
8 Associates in July 2005. During the last part of 2005 and the  
9 beginning of 2006, Sarah Scott moved to Auburn, Washington to care  
10 for her dying father. During this time, Sarah worked at Knowledge  
11 Points as a tutor a few hours per week. In March 2006, Sarah began  
12 work as an administrative assistant with her current employer,  
13 Seattle Police Officers Guild.

14 Robert Scott also has a consistent work history, apart from  
15 the time he spent pursuing his higher education and short periods  
16 of transition. From 1999 to 2001, Robert worked at Onsite  
17 Engineering & Management in the warehouse, Nu-West Group as a lab-  
18 temp, and Bartels Immunodiagnostics Inc. as an associate  
19 scientist I. In 2002, when Robert Scott returned to school at  
20 Central Washington University to pursue his Masters degree in  
21 Microbiology, he worked as a teaching and research assistant in the  
22 science department. In 2005, Robert's mentor and advisor left the  
23 university, precluding Robert from finishing his program. Robert  
24 worked in a few short-term positions during the summer of 2005  
25 until he began as a sales representative at Stereotomony Inc. for  
26 one year beginning in September 2005. Robert was in transition  
27 during the fall of 2006 until he retained his position at Ondine  
28 Research Laboratories Inc. in December of 2006. He was laid off

MEMORANDUM DECISION - 4

1 from Ondine Research Laboratories Inc. on October 31, 2009 for  
2 company financial reasons beyond his control. Robert began his  
3 current position at the University of Washington as a molecular  
4 biologist on December 4, 2008.

5 Robert and Sarah Scott testified at trial that they do not  
6 have opportunities to increase their income in the future. Sarah  
7 testified that she has been promoted to the highest level possible  
8 at her current job, unless she becomes a police officer. She  
9 stated that no other promotions or raises are available other than  
10 annual cost of living increases. Sarah works overtime, but does  
11 not receive compensation for that extra work. Robert Scott  
12 testified that he feels lucky to have his job at University of  
13 Washington in the biotech industry, which is struggling in the  
14 current economy. He testified that his current income is  
15 comparable to other similar positions in his field. Robert is paid  
16 with funds from a three year grant from the National Science  
17 Foundation and, due to the economy, his cost of living increases  
18 are on hold. Robert stated that his job contract will expire in  
19 approximately two and a half years, at which time, he will either  
20 have to retain a new position, or may continue at the University of  
21 Washington if more funding is secured. No evidence was presented  
22 that Robert or Sarah Scott can expect an increase in income during  
23 the Loan repayment periods that will significantly improve their  
24 financial condition.

25 C. Expenses. Plaintiffs filed an amended Schedule J on  
26 July 21, 2009 to accurately depict their current expenditures, set  
27 forth in Ex. P-24. Plaintiffs' monthly expenses are listed at  
28

MEMORANDUM DECISION - 5

1 \$6,831.90; thus, expenses exceed their monthly income of \$5,826.72  
2 by approximately \$1,005.18.

3       Schedule J reflects that Plaintiffs rent a four bedroom home  
4 owned by Sarah Scott's mother, Catherine Scott. Plaintiffs pay  
5 \$1,055 per month in rent to Catherine Scott. Sarah testified that  
6 the rent amount is based upon what Catherine Scott pays to rent her  
7 own apartment and rent will increase with Catherine Scott's  
8 apartment rental increases. Plaintiffs pay \$1,461.47 in monthly  
9 day care expenses. Sarah Scott testified that they get a two child  
10 discount and have shopped for less expensive day care facilities,  
11 but have not found anything less expensive. When Plaintiffs' older  
12 son begins first grade, Plaintiff' day care expenses will decrease  
13 by \$161 per month. Plaintiffs plan to pay day care expenses for at  
14 least the next seven years, however, until their oldest son reaches  
15 age twelve.

16       Plaintiffs have significant automobile expenses. They bought  
17 a used 2006 Subaru Tribeca post-petition in May 2008. The monthly  
18 payment for the Subaru is just under \$500 with an annual interest  
19 rate of 15-18%. In addition, Plaintiffs report \$779 in monthly  
20 expenses for gas and vehicle maintenance and \$257 in monthly  
21 automobile insurance expense. Sarah Scott uses the Subaru to drive  
22 to and from work as well as to run errands and take the children to  
23 day care. Sarah testified that using public transportation would  
24 require her to make multiple transfers to get to her south downtown  
25 Seattle job and would make it difficult to get to her children's  
26 day care in an emergency. Plaintiffs borrow their second car from  
27 Robert's mother, Deanna Scott, at no expense and that car is used  
28 primarily by Robert Scott to travel to work.

MEMORANDUM DECISION - 6

1 Plaintiffs' monthly food budget for their family of four is  
2 \$900. Sarah testified that the food budget has risen since her  
3 younger son stopped breast feeding. She also testified that they  
4 do not go out to dinner and the food budget is for healthy,  
5 nutritious food. Plaintiffs' budget includes \$40 per month for  
6 internet service and \$70 per month for two cell phones. Sarah  
7 Scott testified that both she and her husband use the internet for  
8 work purposes such as checking email at night, and that she needs  
9 her cell phone in case of an emergency at work. Sarah and Robert  
10 also use their cell phones to communicate with each other during  
11 the day to coordinate who will pick up the children.

12 Plaintiffs pay \$49 per month for satellite television. Sarah  
13 Scott testified that television is the family's sole form of  
14 entertainment and that they have no extra money for vacations,  
15 movies and other forms of entertainment. Plaintiffs' entertainment  
16 budget is \$17 per month. Plaintiffs pay \$161 per month in pet  
17 expenses for two cats and one dog. Sarah Scott testified that the  
18 golden retriever has a thyroid condition which requires medication  
19 and special food. She testified that their son's doctor  
20 recommended retaining the dog to aid in the treatment of their  
21 son's psychological problems. Plaintiffs pay \$100 per month to  
22 their attorney for fees related to the litigation in this case.  
23 They also have \$20,000 in non-student loan debt and an unpaid  
24 medical bill of approximately \$900.

25 D. Loan Repayment. Both of Plaintiffs' USDOE loans are  
26 currently under the William D. Ford program (Direct Loans). [Ex.  
27 P-22]. As of August 25, 2009, the combined amount due on the USDOE  
28 loans was \$109,330.19, with 2.48% interest rate (changed July 1,

MEMORANDUM DECISION - 7

1 2009). A payment of \$241.38 was made on February 15, 2001 for  
2 Robert Scott's loan and a payment of \$370.26 was made on  
3 February 28, 2005 for Sarah Scott's loan. Plaintiffs were granted  
4 multiple deferments and forbearances on each loan. Loan deferments  
5 and forbearances for Robert Scott's loans were in effect nearly  
6 continuously from February 7, 2001 through August 7, 2008.  
7 Deferments and forbearances on Sarah Scott's loans were in effect  
8 from December 21, 2003 through December 22, 2004, then nearly  
9 continuously from March 25, 2005 through the present date. [Ex. P-  
10 22].

11 Plaintiffs' Educap loans are not eligible for consolidation  
12 into the William D. Ford program and no further extensions,  
13 deferments, or forbearances are available. As of August 18, 2009,  
14 Plaintiffs owe \$34,028.94 for both Educap loans, with varying  
15 interest rates starting at 8.15% on \$12,572.93 and 10.15% on  
16 \$21,456.01. Seventy two payments have been made on both loans  
17 since August 2004, totaling \$19,833.62. Deanna Scott was a co-  
18 signer on both Educap loans, but was discharged of her debts by an  
19 agreed order after she made a \$4,000 payment on August 19, 2009.  
20 The current monthly payment for the two Educap loans is \$281.

21 Plaintiffs' TERI loans are also not eligible for consolidation  
22 into the William D. Ford program. As of August 5, 2009,  
23 Plaintiffs' owe \$179,084.68 on six TERI loans. The loans have  
24 variable interest rates, 5.060% on \$154,061.45 and 9.601% for the  
25 remaining \$25,023.23. Thirty payments totaling \$3,541.25 were made  
26 on the two loans on which Sarah Scott was the primary borrower. In  
27 April 2009, a \$2,703.48 payment was made by co-obligor Deanna  
28 Scott. This payment is being held in a trust by TERI's attorneys.

MEMORANDUM DECISION - 8



1 Temporary hardship forbearances were in effect during the following  
2 dates: (1) December 14, 2003 through June 14, 2004; (2) July 27,  
3 2004 through January 27, 2005; (3) January 1, 2006 through June 30,  
4 2006; (4) August 1, 2006 through January 31, 2007; and (5) March 2,  
5 2006 through June 1, 2006. The current monthly payment for the  
6 combined six loans is \$968.78.

## 7 II. JURISDICTION

8 This Court has jurisdiction of this matter under 28 U.S.C.  
9 § 1334 and 28 U.S.C. § 157(b)(2)(I) and this is a core proceeding.

## 10 III. CONCLUSIONS OF LAW

### 11 A. The Brunner Requirements.

12 Section 523(a)(8) provides that student loans of the type at  
13 issue in this case are nondischargeable "unless excepting such debt  
14 from discharge ... will impose an undue hardship on the debtor and  
15 the debtor's dependents." The Ninth Circuit Court of Appeals has  
16 adopted the three-part test from *In re Brunner*, 46 B.R. 752  
17 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987), to determine  
18 whether excepting a student loan from discharge constitutes an  
19 undue burden on a debtor. *United Student Aid Funds, Inc. v. Pena*  
20 (*In re Pena*), 155 F.3d 1108 (9<sup>th</sup> Cir. 1998). Under *Brunner*, a  
21 student loan is dischargeable only if:

- 22 1. The debtor cannot, based on current income and  
23 expenses, maintain a "minimal" standard of living  
24 for himself or his dependents if forced to repay the  
loans;
- 25 2. additional circumstances exist indicating that this  
26 state of affairs is likely to persist for a  
significant portion of the repayment period of the  
student loans; and
- 27 3. the debtor has made good faith efforts to repay the  
28 loans.

1 Plaintiff has the burden of proving each of the above elements by a  
2 preponderance of the evidence.

3 Each defendant has the burden of proving by a preponderance of  
4 the evidence that (1) the debt is in fact an educational loan,  
5 (2) the loan was made, and (3) the loan was insured/guaranteed by a  
6 governmental unit or was made under a program funded in whole or in  
7 part by a governmental unit or non-profit institution. Plaintiffs  
8 have stipulated that the Loans meet these conditions.

9 B. Plaintiff's Ability to Maintain a Minimal Standard of  
10 Living.

11 Plaintiffs must prove that they cannot, based on their current  
12 income and expenses, maintain a "minimal" standard of living for  
13 themselves and their dependents if forced to repay the loans. The  
14 Court concludes that Plaintiffs have met this burden.

15 The first prong of the *Brunner* Test requires more than a  
16 showing of tight finances. *United States Aid Funds, Inc. v.*  
17 *Nascimento (In re Nascimento)*, 241 B.R. 440, 445 (9<sup>th</sup> Cir. BAP  
18 1999). In defining undue hardship, courts require more than  
19 temporary financial adversity but typically stop short of utter  
20 hopelessness. In *In re Nys*, 446 F.3d 938 (9<sup>th</sup> Cir. 2006), the 9<sup>th</sup>  
21 circuit endorsed the trial court's review of the following  
22 nonexclusive factors relevant to the *Brunner* elements:

- 23 (1) Serious mental or physical disability of the debtor  
or a dependent of the debtor which prevents  
employment or advancement;
- 24 (2) The debtor's obligations to care for dependents;
- 25 (3) Lack of, or severely limited education;
- 26 (4) Poor quality of education;
- 27 (5) Lack of usable or marketable job skills;
- 28 (6) Underemployment;
- (7) Maximized income potential in the chosen educational  
field, and no other more lucrative job skills;
- (8) Limited number of years remaining in the debtor's  
work life to allow payment of the loan;

MEMORANDUM DECISION - 10

- 1 (9) Age or other factors that prevent retraining or  
2 relocation as a means for payment of the loan;  
3 (10) Lack of assets, whether or not exempt, which could  
4 be used to pay the loan;  
5 (11) Potentially increasing expenses that outweigh any  
6 potential appreciation in the value of the debtor's  
7 assets and/or likely increases in the debtor's  
8 income; and  
9 (12) Lack of better financial options elsewhere.

6 Except for brief periods of unemployment out of their control,  
7 Plaintiffs have been consistently employed since the Loans first  
8 became due. Robert and Sarah Scott currently work full-time.  
9 Although Sarah Scott is not specifically using her degree in  
10 elementary education, she would not have been promoted to  
11 operations manager at the Seattle Police Officers Guild without a  
12 college degree and she testified that no further promotions are  
13 available. Sarah would not earn substantially more and would  
14 likely earn less if she were to use her elementary education degree  
15 as a school teacher. Robert Scott's degree in microbiology has  
16 enabled him to work in his current position with the University of  
17 Washington. Since Robert was unable to finish his post-graduate  
18 degrees for reasons beyond his control, he is unable to earn  
19 substantially more in his present field or at a different job.  
20 Therefore, there is no evidence to suggest that Plaintiffs can  
21 further maximize their income potential in their chosen educational  
22 fields nor do either possess more lucrative job skills. Although  
23 Robert Scott testified to having hernia operations and subsequent  
24 pain, no evidence suggests that this will prevent him from working  
25 in his field in the future. Plaintiffs testified that they possess  
26 no assets, such as retirement accounts or other savings accounts,  
27 from which they can contribute to the Loans.  
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MEMORANDUM DECISION - 11

1 As previously noted, Plaintiffs have two young dependent  
2 children. Since both Plaintiffs work full-time, day care expenses  
3 are necessary. Sarah Scott testified that their current daycare  
4 expense is the lowest monthly payment they could find. Further, as  
5 the children grow older, Plaintiffs' expenses will inevitably rise  
6 as their sons require more food, begin sports, and require  
7 increased educational expenses and school supplies.

8 Although Plaintiffs could reduce their expenses by selling  
9 their Subaru Tribeca (\$494), cancelling satellite television  
10 (\$49), cancelling internet service (\$40), cancelling yard service  
11 (\$20), and giving up their pets (\$161), the anticipated savings  
12 will not be sufficient to cover their current monthly net loss of  
13 \$1,005.18. In order to generate positive monthly net income from  
14 which some part of the Loans could be repaid, Plaintiffs' monthly  
15 expenses would have to be reduced to the point where they could not  
16 pay even basic living expenses.<sup>3</sup>

17 With the exception of the purchase of the Subaru Tribeca,  
18 Plaintiffs have made reasonable attempts to minimize expenses.  
19 They have consistently worked long hours and have few excesses in  
20 life. The defendants failed to articulate any scenario in which  
21 reductions to Plaintiffs' current expenses could result in positive  
22 net income from which the Loans can be paid.

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26 <sup>3</sup> Plaintiffs monthly shortfall is eliminated only if they  
27 reduce transportation expenses to \$500 per month, reduce their car  
28 payment to \$200 per month and eliminate all pet expenses,  
miscellaneous personal expenses, yard expenses, and internet  
expenses. Even those drastic reductions will not produce positive  
net income.

1           C.   Additional Circumstances.

2           Plaintiffs must demonstrate their inability to pay in the  
3 present and a likely inability to pay in the future. *In re Nys*,  
4 *supra*. They need not demonstrate exceptional circumstances beyond  
5 that. *Id.* Specifically, Plaintiffs must demonstrate that their  
6 inability to pay will likely persist throughout a substantial  
7 portion of the loan repayment period. *Id.* at 947. The Court finds  
8 that Plaintiffs have met this burden. There is no suggestion, as  
9 in *Nys*, that Plaintiffs have purposefully adopted a lifestyle that  
10 prevents them from repaying their student loans.

11           In this instance, aside from a possible poor decision to  
12 purchase the Subaru Tribeca, Plaintiffs live frugally and have  
13 made reasonable choices about their income and expenses.  
14 Plaintiffs have taken only one family vacation during which they  
15 stayed in their mother-in-law's hotel room. Plaintiffs do not go  
16 out to dinner or to the movies and have a very limited  
17 entertainment budget.

18           The Court finds that Plaintiffs cannot expect significant  
19 increases in their future income sufficient to cover their monthly  
20 shortfall and increasing expenses that will naturally occur with  
21 the growth of their children. Given their education and job  
22 opportunities, Plaintiffs have maximized their income potential  
23 with their current jobs and cannot expect an increase in income  
24 during the course of the repayment period. [See I. FACTS, B.  
25 Income, ¶4]. Accordingly, despite the fact that Plaintiffs are  
26 relatively young, the Court finds that they will not have  
27 sufficient income to pay the Loans through a substantial portion of  
28 the repayment period.

MEMORANDUM DECISION - 13

1       D.   Good Faith.

2       Plaintiffs must prove that they have made good faith efforts  
3 to repay the Loans. "Good faith is measured by the debtor's  
4 efforts to obtain employment, maximize income, and minimize  
5 expenses." *In re Birrane*, 287 B.R. 490 (9th Cir. BAP 2002).  
6 *Birrane* states that good faith is also measured by the debtor's  
7 efforts to negotiate a repayment plan. In *Birrane*, the debtor made  
8 payments on her loan for some period of time and had made efforts  
9 to negotiate repayment, even though those efforts were denied.  
10 Then the debtor was informed at trial of an ICRP option for  
11 repayment. The Court found she lacked good faith in not having  
12 discussions with the lender about that option. *Birrane* found that  
13 the debtor's failure to maximize her income and her failure to take  
14 steps to renegotiate payment were indications of a lack of good  
15 faith such that discharge of her student loan should be denied.

16       As stated above, Plaintiffs have maximized their income  
17 potential given their employment prospects. Further, Plaintiffs  
18 have made efforts to repay their loans and negotiate repayment  
19 plans. Plaintiffs consistently requested deferments and  
20 forbearances when appropriate. They have made two payments on the  
21 USDOE loans and have been granted deferments and forbearances for a  
22 majority of the loan repayment period. The USDOE has set forth  
23 repayment plan options in Exhibit A-13. A significant portion of  
24 the Educap loans have been repaid (\$19,833.62). Finally,  
25 Plaintiffs have made thirty payments totaling \$3,541.25 on two of  
26 the TERI loans, and have been granted temporary hardship  
27 forbearances for a significant portion of the repayment period.  
28 Plaintiffs have been informed that no further forbearances,

MEMORANDUM DECISION - 14

1 deferments, or consolidation options are available on the Educap  
2 and TERI loans. The Court finds, based upon the foregoing facts,  
3 that Plaintiffs' efforts to make payments on the Loans and to  
4 negotiate more favorable repayment terms satisfy the good faith  
5 requirement.

6 On the basis of the foregoing, after application of the  
7 *Brunner* factors, the Court concludes that requiring Plaintiffs to  
8 pay any portion of the Loans will impose an undue hardship on them  
9 and their dependents.

10 **CONCLUSION**

11 Having met their burden of proving the *Brunner* factors, the  
12 Court finds that Plaintiffs are entitled to discharge of the Loans.  
13 The Court will enter an order to that effect upon presentation by  
14 Plaintiffs.

15 ///END OF MEMORANDUM///  
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19 United States Bankruptcy Judge  
20 (Dated as of Entered on Docket date above)  
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MEMORANDUM DECISION - 15